

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,) No. C 12-3007 LHK (PR)
Plaintiff,) ORDER GRANTING DEFENDANTS'
v.) MOTION FOR LEAVE TO FILE
CORRECTIONAL SGT. D.) MOTION FOR RECONSIDERATION;
BARNEBURG, et al.,) VACATING ORDER DENYING
Defendants.) DEFENDANTS' MOTION TO
DISMISS; GRANTING
DISMISS
(Docket No. 48)

On June 11, 2012, plaintiff, a California state prisoner proceeding *pro se*, filed a civil rights action under 42 U.S.C. § 1983, alleging that correctional officers at Pelican Bay State Prison used excessive force upon him. On February 28, 2013, defendants filed a motion to dismiss the action as untimely. On June 11, 2013, the court denied defendants' motion to dismiss. Defendants have filed a motion for leave to file a motion for reconsideration. Plaintiff has not filed an opposition.

For the reasons that follow, defendants' motion for leave to file a motion for reconsideration is GRANTED, the court's June 11, 2013, order denying defendants' motion to dismiss is VACATED, and defendants' motion to dismiss is GRANTED.

1 **I. LEGAL STANDARD**

2 “Reconsideration is appropriate if the district court (1) is presented with newly
3 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or
4 (3) if there is an intervening change in controlling law.” *School Dist. No. 1J v. ACandS, Inc.*, 5
5 F.3d 1255, 1263 (9th Cir. 1993). In the Northern District of California, no motion for
6 reconsideration may be brought without leave of court. *See* Civil L.R. 7-9(a). Under Civil Local
7 Rule 7-9, the moving party must specifically show: (1) that at the time of the motion for leave, a
8 material difference in fact or law exists from that which was presented to the court before entry
9 of the interlocutory order for which the reconsideration is sought, and that in the exercise of
10 reasonable diligence the party applying for reconsideration did not know such fact or law at the
11 time of the interlocutory order; or (2) the emergence of new material facts or a change of law
12 occurring after the time of such order; or (3) a manifest failure by the court to consider material
13 facts or legal arguments which were presented to the court before such interlocutory order. *See*
14 Civil L.R. 7-9(b).

15 **II. ANALYSIS**

16 Defendants ask the court to reconsider the denial of their motion to dismiss because
17 plaintiff was not entitled to equitable tolling under California law, and without equitable tolling,
18 plaintiff’s complaint was untimely.

19 Previously, in *Sandoval v. Tilton*, No. 08-865 JSW (filed on Feb. 8, 2008), plaintiff had
20 raised, *inter alia*, an excessive force claim. (Doc. No. 35, Req. Jud. Not., Ex. A.) After filing an
21 amended complaint, defendants in *Sandoval v. Tilton*, No. 08-865 JSW, filed a motion to dismiss
22 for failure to state a claim and misjoinder. (*Id.*, Ex. F.) On March 24, 2010, the court agreed and
23 dismissed the amended complaint with leave to amend. (*Id.*, Ex. G.) The court informed
24 plaintiff that if he wished to continue to pursue unrelated claims, he must raise the unrelated
25 claims in separate complaints. The court further explained that the amended complaint failed to
26 link several individual defendants to specific facts. On August 6, 2010, plaintiff filed a second
27 amended complaint. (*Id.*, Ex. H.) On November 8, 2010, the court dismissed the second
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1 amended complaint because it did not comply with the court's directions to cure the stated
2 deficiencies, including misjoinder and failing to link individual defendants to specific acts. (*Id.*,
3 Ex. I.) Plaintiff appealed the dismissal, and the Ninth Circuit affirmed the judgment on February
4 9, 2012. (*Id.*, Ex. K.)

5 Plaintiff then filed the underlying action on June 11, 2012, and again raised the same
6 excessive force claim as he had alleged in *Sandoval v. Tilton*, No. 08-865 JSW. Defendants filed
7 a motion to dismiss the complaint as untimely. This court denied defendants' motion to dismiss.
8 In the court's order, it agreed that, without tolling, the underlying action was approximately three
9 years late. The court further determined that plaintiff was not entitled to statutory tolling
10 because plaintiff was sentenced to a term of life without the possibility of parole. *See* Cal. Civ.
11 Proc. Code § 352.1(a) (recognizing that imprisonment can toll the statute of limitations when a
12 person is "imprisoned on a criminal charge, or in execution under the sentence of a criminal
13 court for a term of *less than* for life.") (emphasis added). In addition, the court concluded that
14 California's general doctrine of equitable tolling was inapplicable because plaintiff's first action
15 – *Sandoval v. Tilton*, No. 08-865 JSW – was filed in the same forum as plaintiff's second
16 underlying action. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993)
17 (noting that the general doctrine of equitable tolling "“reliev[es] plaintiff from the bar of a
18 limitations statute when, possessing several legal remedies he, reasonably and in good faith,
19 pursues one designed to lessen the extent of his injuries or damage.”") (quoting *Addison v.*
20 *California*, 21 Cal.3d 313, 317 (1978)); *Thomas v. Gilliland*, 95 Cal. App. 4th 427, 525 (2002)
21 ("The doctrine of equitable tolling, however, only applies where the plaintiff has alternate
22 remedies and has acted in good faith.").

23 Then, the court examined California's *Bollinger* rule, *Bollinger v. National Fire Ins. Co.*,
24 25 Cal. 2d 399 (1944), which provided another, more narrow, type of equitable tolling when a
25 plaintiff files a timely initial action, and then a secondary action in the same forum. Stated more
26 specifically, *Bollinger* found that tolling was appropriate when: (1) the trial court erroneously
27 dismissed the first action; (2) dilatory tactics on the part of the defendant "prevented disposition
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1 of the first action in time to permit a second filing within the [limitations period]”; and (3) the
2 plaintiff had at all times proceeded in a diligent manner. *Wood v. Elling Corp.*, 20 Cal.3d 353,
3 361 (1977). In the instant case, this court considered the unique procedural circumstances of the
4 instant case, the fact that plaintiff had raised his excessive force claim in a timely manner in the
5 first action, plaintiff’s misunderstanding of the rule of joinder, and plaintiff’s diligence in
6 pursuing relief from the dismissal of the first action, and concluded that plaintiff should receive
7 equitable tolling. As a result, the court denied defendants’ motion to dismiss. Thereafter,
8 defendants filed the underlying motion for reconsideration.

9 After careful consideration of defendants’ arguments for reconsideration, the court
10 concludes that the denial of defendants’ motion to dismiss was based on a failure to consider the
11 dispositive legal rule of *Bollinger*. See Civil L.R. 7-9(b)(3). California law makes clear that in
12 order to be entitled to equitable tolling under the *Bollinger* rule, a plaintiff must demonstrate all
13 three *Bollinger* factors. See *Allen v. Greyhound Lines, Inc.*, 656 F.2d 418, 421 (9th Cir. 1981)
14 (“The [California Supreme Court] thus made it clear that to avoid the literal language of [section
15 335], the plaintiff must demonstrate the existence of those three factors present in *Bollinger*.”);
16 *Hull v. Central Pathology Service Medical Clinic*, 28 Cal. App. 4th 1328, 1337 (1994)
17 (reiterating that the three *Bollinger* factors are prerequisites expressly required to apply tolling);
18 *Wood*, 20 Cal.3d at 361 (“the concurrence of the three factors present in *Bollinger* is essential to
19 an application of the rule”).

20 In denying defendants’ motion to dismiss, this court did not consider that all three
21 *Bollinger* factors must be present before equitable tolling can apply. Thus, despite plaintiff’s
22 first federal action, *Sandoval v. Tilton*, No. 08-865 JSW – which raised the underlying excessive
23 force claim – being timely, the court’s dismissal of that case for violating the rule of misjoinder
24 was affirmed, plainly demonstrating that the dismissal for misjoinder was not in error. In
25 addition, even though plaintiff appeared to diligently pursue his direct appeal, plaintiff has not
26 and cannot demonstrate that defendants engaged in dilatory behavior, or that the court’s initial
27 dismissal was erroneous. Without satisfying all the *Bollinger* factors, plaintiff is not entitled to
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1 equitable tolling.¹

2 A review of several California cases applying the *Bollinger* rule is helpful here. In
3 *Tannhauser v. Adams*, 31 Cal. 2d 169, 177 (1947), the plaintiff filed an action to quiet title. The
4 suit was later dismissed for want of prosecution. Six months later, the plaintiff filed a motion to
5 set aside the order, which was denied. Thereafter, the plaintiff filed an untimely second action.
6 The California Supreme Court concluded that the plaintiff was not entitled to equitable tolling
7 under *Bollinger*, because the first action was not diligently pursued, and the first action was
8 dismissed due to the plaintiff's own error. *Id.* at 177-78.

9 Later, in *Wood*, 20 Cal. 3d 353 (1977), the plaintiff filed suit against corporate
10 defendants. The Superior Court dismissed the action because the plaintiff had failed to timely
11 serve the named defendants. *Elling Corp. v. Superior Court*, 48 Cal. App. 3d 89 (1975). The
12 plaintiff then brought a second action in Superior Court, naming the same defendants and
13 requesting the same relief. In holding that the first action did not toll the statute of limitations,
14 the California Supreme Court stated that when the failure to comply with provisions regarding
15 timely service and prosecution of claims "operate to bring about a dismissal, the applicability of
16 the pertinent statute of limitations is restored as if no action had been brought." *Wood*, 20 Cal.
17 3d at 359. Here, as in *Wood*, plaintiff's first action was dismissed without prejudice because he
18 failed to cure the deficiencies, i.e., misjoinder, as ordered by the court.

19 Also, in *Hull*, 28 Cal. App. 4th 1328 (1994), the plaintiff brought a medical malpractice
20 action in state court. She sought leave to amend, which was denied, and then filed a new action
21 in state court alleging the same cause of action she brought in her first suit, and adding another
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23 ¹ The court notes that some California cases list the *Bollinger* factors as: "(1) the
24 plaintiff must have diligently pursued his or her claim; (2) the fact that the plaintiff is left
25 without a judicial forum for resolution of the claim must be attributable to forces outside the
26 control of the plaintiff; and (3) the defendant must not be prejudiced by application of the
27 doctrine." *Hull v. Central Pathology Service Medical Clinic*, 28 Cal. App. 4th 1328, 1336
28 (1994). Even using these factors, plaintiff is still not entitled to equitable tolling because he fails
to satisfy the second factor. The court's dismissal of plaintiff's first federal action was due to
plaintiff's failure to understand misjoinder and failure to comply with the Federal Rules of Civil
Procedure. These failures were not outside plaintiff's control.

1 claim. The California Court of Appeal concluded that the second suit was barred by the statute
2 of limitations because the plaintiff had not diligently pursued the claims asserted in the second
3 action, and, due to the plaintiff's own failure to comply with the civil rules, the plaintiff failed to
4 properly amend her complaint in the first action. *Id.* at 1336.

5 Finally, in *Hu v. Silgan Containers Corp.*, 70 Cal. App. 4th 1261, 1270-71 (1996), the
6 plaintiff brought a timely action against her employer for discrimination, but failed to pay the
7 filing fee. After the statute of limitations had expired, the court voided the filing based on the
8 plaintiff's failure to pay. Thereafter, the plaintiff paid the filing fee and late charges, but the
9 Superior Court granted judgment on the pleadings to the employer because it had no jurisdiction
10 to "reinstate" the action. The California Court of Appeal rejected the plaintiff's argument for
11 equitable tolling, making a distinction between cases in which a plaintiff chooses between
12 several different forums in filing his first suit, and cases in which a plaintiff files a defective first
13 action. *Id.* at 1270-71. The state appellate court applied *Bollinger*, and concluded that because
14 the plaintiff failed to demonstrate dilatory actions on the part of defendants, or error on the part
15 of the Superior Court, the plaintiff was not entitled to equitable tolling.

16 Thus, applying California case law, plaintiff is not entitled to equitable tolling. Plaintiff
17 did not allege, and the court has not found, that defendants engaged in any dilatory tactics. In
18 addition, the Ninth Circuit Court of Appeal affirmed plaintiff's dismissal in *Sandoval v. Tilton*,
19 No. 08-865 JSW, supporting the fact that the dismissal of plaintiff's first federal action was not
20 in error. Plaintiff's failure to comply with the court's order in *Sandoval v. Tilton*, No. 08-865
21 JSW, combined with the lack of error on the court's part and lack of dilatory tactics on
22 defendants' part, do not satisfy the elements required to equitably toll the statute of limitations.
23 *See, e.g., Marasovic v. Contra Costa County Adult Protective Services*, No. 06-15579, 269 Fed.
24 Appx. 758, at **1 (9th Cir. March 12, 2008) (unpublished memorandum disposition) (affirming
25 dismissal of Section 1983 action because the *pro se* plaintiff did not "diligently pursue her initial
26 action against the defendants"); *Dawkins v. Woodford*, No. 09-1053 JLS (POR), 2012 WL
27 554371, at *4-5 (S.D. Cal. filed Feb. 21, 2012) (unpublished) (concluding *pro se* prisoner was
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not entitled to equitable tolling during the pendency of his previous federal actions which were dismissed for failing to timely serve defendants); *Easley v. County of El Dorado*, No. 08-1432 MCE KJN, 2010 WL 4569137, at *15 (E.D. Cal. filed Nov. 3, 2010) (unpublished) (rejecting *pro se* prisoner's request for equitable tolling as unreasonable and lacking in good faith when his first complaint was filed in federal court and later dismissed due to plaintiff's own failure to file an amended complaint), *aff'd* by 478 Fed. Appx. 447 (9th Cir. 2012) (unpublished memorandum disposition); *Diggs v. Williams*, No. CIV S-05-1168 DFL GGH P, 2006 WL 1627887, at *3 (E.D. Cal. June 8, 2006) (unpublished) (finding *pro se* prisoner's complaint untimely and stating that "California courts have declined to find equitable tolling in cases where the plaintiff's own conduct delayed the prosecution of his previous action."); *see also Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1036 (9th Cir. 1983) (interpreting third factor of the doctrine of equitable tolling to require that plaintiff must act reasonably and in good faith regarding the filing of the first claim and the later claim).

Accordingly, plaintiff's complaint is untimely. Because the court committed clear error in its initial decision denying defendants' motion to dismiss, defendants' motion for reconsideration is GRANTED. *See School Dist. No. 1J*, 5 F.3d at 1263; Civil L.R. 7-9(b)(3).

III. CONCLUSION

Defendants' motion for leave to file a motion for reconsideration is GRANTED. The court VACATES its June 11, 2013, order denying defendants' motion to dismiss. Defendants' motion to dismiss is GRANTED. The Clerk shall terminate all pending motions as moot and close the file.

IT IS SO ORDERED.

DATED: 11/6/13


 LUCY H. KOH
 United States District Judge